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NO. 314

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

WICHITA ROYALTY COMPANY ET AL, *Petitioners*

versus

CITY NATIONAL BANK OF WICHITA FALLS ET AL,
Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BAILEY—WICHITA FALLS

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JURISDICTION

The opinion of the Circuit Court of Appeals was entered March 23, 1938. (R. 2069.) A petition for rehearing was denied April 18, 1938. (R. 2085.) A second hearing was filed May 23, 1938. (R. 2089.) The opinion on the second motion for rehearing was entered June 10, 1938. (R. 2092.)

QUESTION PRESENTED

The sole question presented is whether or not the

opinions of the Circuit Court of Appeals, in respect to the liability of banks in the handling of fiduciary deposits, conflicts with the general law of Texas as announced by its highest courts.

STATUTES AND AUTHORITIES

The pertinent statutes will be found in the Appendix, pp. 9, 10.

STATEMENT AND ARGUMENT

The point made by the petitioners is that the Circuit Court of Appeals did not follow the *reasoning* of the Texas Supreme Court on a former appeal of this case. In considering the effect of the statements of the Supreme Court in remanding this case, its opinion, both on original hearing and on motion for rehearing, must be considered in the light of the Texas practice. The appeal to the State Supreme Court was from an instructed verdict upon a cause of action wherein it was charged that the bank had knowingly received deposits belonging to the fiduciary in satisfaction of its own debt, and had knowingly aided the trustee in the spoilation of the trust funds.

Under the settled law of Texas, if there was evidence above a surmise or suspicion supporting such allegations, it was the duty of the trial court to submit such issues to a jury. *Joske v. Irvine*, 91 Texas 574, l. c. 582. In this case it is said:

"This court in Lee v. Railway, 89 Texas 588, said: 'To authorize the court to take the question

from the jury, the evidence must be of such a character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it.' In Mynning v. Railway, 64 Mich., 93, the rule is stated thus: 'If the circumstances are such that reasonable minds might draw different conclusions respecting the plaintiff's fault, he is entitled to go to the jury upon the facts. The judge takes the case from the jury only when it is susceptible of but one just opinion.' The Supreme Court of the United States has approved the rule announced in Ryder v. Wombwell, supra. Improvement Co. v. Munson, 14 Wall., 442; Board of County Com. v. Clark, 4 Otto, 278; Griggs v. Houston, 14 Otto, 553.

"From a careful examination of the cases it appears, (1) that it is the duty of the court to instruct a verdict, though there be slight testimony, if its probative force be so weak that it only raises a mere surmise or suspicion of the existence of the fact sought to be established—such testimony in legal contemplation falling short of being 'any evidence,' and (2) that it is the duty of the court to determine whether the testimony has more than that degree of probative force."

Under the Texas decisions, the reversal by the Supreme Court placed the parties in the same position as they occupied before the cause was tried. The action of the Supreme Court reversing the case had the effect of granting a new trial, which by operation of law opened up the entire case. *M. H. Lauchheimer & Sons v. Coop*, ... Tex. Civ. App. ....., 86 S. W. 57.

In the reversal of the case by the Supreme Court

of Texas, it suggested an audit to determine the true facts. When this audit was made and the facts thus fully developed, it conclusively showed that the Wichita Royalty Company's present trustee, E. E. Scannell, had on the trial in the state court concealed material facts (R. 1929), and that substantially all of the alleged items complained of by the Wichita Royalty Company were shown to have been proper and right; so the case developed in the United States District Court was entirely different in many respects from the case as made which was before the Supreme Court of Texas. See *Judge Atwell's opinion*, 18 F. Supp. 795.

The remand of the case by the Supreme Court of Texas was a direction to the lower court to submit disputed issues upon the questions discussed, for jury findings. The statements by the commissioner who rendered the decision on original submission, especially in view of the opinion on rehearing, as well as the decision by the Supreme Court in the case of *Quanah, Acme & Pacific Railway Company v. Wichita State Bank & Trust Company*, 127 Texas Reports 407, would neither be an estoppel nor *res adjudicata* as to the law of the case. *Revised Statutes of Texas, Art.* 2211.

Had the case remained in the state court and on appeal to the Supreme Court of Texas, it would have been the duty of that court to declare or redeclare the law applicable to the facts found on the second appeal. By removal the Circuit Court of Appeals became the court of review and as correctly said by that court:

"We have the same right and duty to declare

or redeclare the law of this case that the Supreme Court of Texas would now have if the case had been removed." (Wichita Royalty Company v. City National Bank, Circuit Court of Appeals, 97 F. (2d) 249.)

An analysis of the four opinions by the Supreme Court of Texas, two in the case of Wichita Royalty Company v. City National Bank, 127 Texas Reports 158-184, and two in the case of Quanah, Acme & Pacific Railway Company v. Wichita State Bank & Trust Company, first case not officially reported, 89 S. W. (2d) 385, on rehearing 127 Texas Reports 407, clearly show that the Circuit Court of Appeals' opinion is in harmony with the general law of Texas.

The Supreme Court on original submission in both cases placed the bank's liability upon the doctrine of constructive notice, or a duty to inquire from suspicious circumstance,—in effect negligence. Excrept from the original opinion in the case of Quanah, Acme & Pacific Railway Company v. Wichita State Bank & Trust Company, reported in 89 S. W. (2d) 385, not printed in the official reports but withdrawn, holds:

"The decisions are practically in accord, in all cases involving deposits by fiduciaries, in holding that a bank receiving a check and placing it to the personal account of the fiduciary is liable if there are surrounding facts and circumstances of which the bank has knowledge indicating that the transaction involves a conversion and which are sufficient to charge it with the *duty of inquiry*, and

we so hold." (89 S. W. (2d) 391, Section 4; (our italics.)

Wichita Royalty Company v. City National Bank of Wichita Falls, decided by another commissioner on the same date, 127 Texas 158, 89 S. W. (2d) 394, announces the same legal principle:

> "The bank and Harrell had constructive knowledge of Peckham's dishonesty, and inquiry pursued with reasonable diligence would have disclosed the facts showing Peckham's lack of authority and breaches of trust."

This theory was repudiated by the Supreme Court on rehearing in the Quanah, Acme & Pacific case (Quanah, Acme & Pacific Railway Company v. Wichita State Bank & Trust Company, 127 Texas 407), as shown from the following quotation:

> "In our opinion, the above question (a duty to inquire) should be answered in the negative. In this connection, we think the great weight of and better authority is to the effect that it is not deemed a breach of trust, or such a suspicious circumstance, as to put a duty on the bank to investigate for a trustee to carry trust credits in his personal bank account, and this even though such fact is known to the bank. In this connection, it is generally held that the bank is entitled to believe that the trustee will check the trust credit out of his personal account for proper trust purposes. The main reasons for this rule are that to require the bank to investigate such transactions would put a

> burden on the bank for which it is not paid by the trust, and would clog the handling of commercial paper in a way that would be to the disadvantage generally of trust business, and also to business in general."

In commenting upon the Royalty Company Case, that court emphasized the fact that it was charged that the bank actively participated in the spoilation of the trust, and knowingly received a part of the fund to itself in payment of the trustee's individual debt to it. That court set at rest in Texas the conflict between those authorities holding that it was the duty of a bank to inquire when suspicious circumstances were brought to its knowledge, and the general weight of authority which holds that a bank is liable only if it acts in bad faith, as shown by the following quotation:

> "In view of this ruling we have found it necessary to choose between the conflicting decisions, and announce the general rule which we think should be followed in this state. This we have done." (1. c. 423.)

On motion for rehearing in the Wichita Royalty Company case the Supreme Court of Texas (127 Texas 184) predicates its decision upon the case of *Steere v. Stockyards National Bank*, 113 Texas 387, which was a case of commingling of funds by a trustee. The Texas courts in that case held the bank liable, not for funds disbursed from said commingled account to others, but only for such funds from such commingled account as the bank received to itself. *Steere v. Stock-*

yards National Bank, 113 Texas 387, 256 S. W. 586; also ___ Tex. Civ. App. ___, 266 S. W. 537, on rehearing in the Court of Civil Appeals from the certificate of the Supreme Court. Other leading Texas cases are:

Interstate National Bank v. Claxton, 97 Texas 569;
Coleman v. First National Bank, 94 Texas 607;
Wheeler Motor Sales Company v. Guerguin, ___ Tex. Civ. App. ___, 16 S. W. (2d) 309;
United States Fidelity & Guaranty Company v. Adoue & Lobit, 104 Texas 393.

In the last cited case the decision of the early leading case of *Gray v. Johnson*, L. R., 3 Eng. & Ir. App. Cas., 1, was expressly approved.

We submit that the decision of the court below correctly conforms to the Texas law in respect to the matters involved.

Respectfully submitted,

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APPENDIX

STATUTES APPLICABLE

Texas Civil Statutes.

Article 1. *Common Law.*

The common law of England, so far as it is not inconsistent with the Constitution and laws of this state, shall together with such Constitution and laws, be the rule of decision, and shall continue in force until altered or repealed by the Legislature.

Article 2211. *Judgments.*

The judgments of the Court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity. Provided, that upon motion and reasonable notice the Court may render judgment *non obstante veredicto* if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any Special Issue Jury Finding that has no support in the evidence. Only one final judgment shall be rendered in any Cause except where it is otherwise specifically provided by law. Judgment may, in a proper case, be given for or against one or more of several plaintiffs, and for or against one or more of several defendants or intervenors.

Article 1771. *Decision.*

In each case, the Supreme Court shall either

affirm the judgment, or reverse and render such judgment as the Court of Civil Appeals should have rendered, or reverse the judgment and remand the case to the lower court, if it shall appear that the justice of the case demands another trial.

(This article was construed in the case of *Williams v. Safety Casualty Co.*, ... Texas ....., 102 S. W. (2d) 178.)